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177 (3) No. 10-240

In The
Supreme Court of the United States

John Steadman Nilsen,
Petitioner,

v.

State of California,
Respondent.

On Petition for a Writ of Certiorari
to the California Supreme Court

REPLY BRIEF FOR PETITIONER

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TABLE OF CONTENTS

TABLE OF AUTHORITIES..... ii
ARGUMENT 1
CONCLUSION..... 7

TABLES OF AUTHORITIES

Cases

Ex Parte v. Riley, 193 S.W.3d 900 (Tex. Crim.App. 2006)..... 2

Halbert v. Michigan, 545 U.S. 605 (2005)..... 4

In re Waltreus, 62 Cal.2d 218 (1965)..... 6

People v. Valdez, 789 P.2d 406 (Colo. 1990)..... 1

Ross v. Moffitt, 417 U.S. 600 (1974)..... 1, 4

Sims v. State, 998 So.2d 494 (Fla SupCt 2008)..... 1

Tolliver v. State, 629 S.W.2d 913, (Tenn. Crim. App. 1981)..... 2

Statutes

Federal

28 U.S.C. §2254 (AEDPA)..... 2

California Rules of Court

§ 8.264 (b)..... 7

§ 8.500 (e)(1)..... 7

§ 8.508 5

REPLY BRIEF FOR PETITIONER JOHN NILSEN

ARGUMENT

This court should grant review to resolve the issue as to the duties, if any, of appellate counsel beyond presentation of oral argument in the appellate court, when counsel knows the criminal defendant wants to seek review of his conviction in the federal courts.

The State claims this case "would present a poor vehicle for this court to further reconsider or limit the holding of *Ross v. Moffitt*." (Opp. at 6.) Petitioner disagrees. The issue raised here regarding the parameters of appellate counsel's constitutional duties on tier-one direct appeal, at least until the decision is rendered and that decision is timely transmitted to the defendant (enabling the defendant to timely petition a higher court and exhaust the state record pro se) is a very important issue in criminal law which remains unresolved in the state courts. Several jurisdictions follow the approach urged by Nilsen and require appellate counsel as part of its duties on direct review, to at least notify the defendant that the decision has issued and transmit the decision to the defendant in a timely manner.[1] And the issue is made ever more important

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[1] See *Sims v. State*, 998 So. 2d 494 (Fla. Sup. Ct. 2008) (holding that appellate counsel maintains the obligation of effective representation to the defendant- client at least until the decision of the appellate court is rendered and transmitted to the defendant); *People v. Valdez*, 789 P.2d 406, 408 (Colo. 1990) (holding that the failures of appellate counsel that

because of the exhaustion requirement and statute of limitations for defendants seeking relief in federal court after AEDPA. At a minimum, this case is ripe for, and this Court should consider, granting summary reversal of the decision of the Supreme Court of California.

Petitioner's counsel was ineffective on his first-tier obligations on direct appeal and petitioner was prejudiced by these failings because he was deprive of filing his petition in the California Supreme Court Pro Se.

The flagrant misadvice and these failings, which prevented Nilsen from timely filing his pro se petition for review in the California Supreme Court and exhaust state remedies, occurred when Nilsen was represented by counsel during the *direct appeal* to the California appellate court. Appellate counsel's duties during direct appeal do not immediately conclude upon the presentation of oral argument in the court of appeal. Appellate counsel must maintain

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preclude the timely filing of a petition for discretionary review may constitute ineffective assistance); *Tolliver v. State*, 629 S.W.2d 913, 915 (Tenn. Crim. App. 1981) (holding that the failures of counsel that preclude a criminal defendant from filing a pro se petition for discretionary review may constitute ineffective assistance); *Ex parte Riley*, 193 S.W.3d 900, 901-02 (Tex. Crim. App. 2006) ("It is the responsibility of counsel appointed on appeal to see the appeal of right through to the end. . . . Normally, when an appellant is not informed of the decision of the court of appeals by his attorney in time for him to file a petition for discretionary review, it will be ineffective assistance of counsel.").

an obligation of effective representation to his client at least until the decision of the appellate court is rendered and that decision is transmitted to the defendant so that the defendant can file the necessary paperwork pro se to preserve his rights to pursue relief in the federal courts. This is particularly true when, as here, counsel knows his client wishes to seek a writ of habeas corpus in federal court. See Appendix B, Declaration of Appellate Counsel.

Here appellate counsel did not notify his incarcerated client that he lost on direct appeal until almost eight months afterwards. And when he finally did notify Nilsen of the decision, he falsely told him that the petition for rehearing and petition for review he had promised to file, *had been filed*, and denied. Appendix B. Thus, these failings occurred during a proceeding in which Nilsen had the constitutional right to effective assistance of appellate counsel. The failures of counsel during the first direct appeal amounted to ineffective assistance of appellate counsel.

The State does not dispute that Nilsen's petition for review to the California Supreme Court was never filed due solely to the dereliction of appellate counsel. But the state seeks to characterize the issue before this Court as whether petitioner was deprived of effective assistance of counsel because the attorney for his direct appeal failed to file a petition for review in the California Supreme Court. (Opp. at 7.) Thus the state concludes that "[B]ecause there is no right to counsel for seeking discretionary review, as is involved with a petition for review to

the California Supreme Court, counsel's failure to file the Petition for Review in the California Supreme Court cannot be deemed deficient performance." (Opp. at 7; citing, *Ross v. Moffitt*, 417 U.S. 600, 616 (1974). The State focuses only on a the issue concerning the performance of counsel during the *discretionary review* stage (i.e., no right to counsel to file a petition for review), whereas the question presented here pertains only to the failures of counsel during the *direct appeal* proceedings. The failures of appellate counsel during the direct appeal precluded Nilsen from being able to exhaust his state issues pro se. Therefore, these failures constituted deficient performance during the direct appeal (not during discretionary review.)

Ross v. Moffitt does not resolve the question presented here. The rational of *Ross* was that a defendant who received effective assistance of appellate counsel in a first- tier appeal would be armed with a trial transcript, an appellate brief setting forth his claims, and the court's opinion disposing of the case. *Ross v. Moffitt*, 417 U.S. at 616; see also, *Halbert v. Michigan*, 545 U.S. 605 (2005). Hence, a defendant, armed with these materials, would have adequate information to proceed on his own. Here Nilsen received none of these items. And he never even had knowledge of the appeals court's decision in time to file a petition for review pro se. Appendix B; Appendix D, Declaration of Appellant.

The State claims petitioner cannot demonstrate he suffered prejudice by the failures of appellate counsel "because it is highly unlikely such review would have been granted had a petition been

filed." (Opp at p. 8.) The state fails to recognize that in California a criminal defendant whose conviction has been affirmed on appeal may file a petition for review in the California Supreme Court *solely to exhaust state remedies*. California Rule of Court, Rule 8.508. Such a petition is not filed with an expectation of the California Supreme Court granting review; rather it is done to exhaust state remedies for purposes of later filing a federal habeas corpus petition. The petition contemplates that there are no viable issues for review in the California Supreme Court. Moreover, the State asserts that the denial of a petition for review does not constitute a decision on the merits. (Opp. at 2.) If so, then it cannot be argued by the State in a prejudice analysis that Nilsen's constitutional claims are without merit merely because the California Supreme Court denied his petition.

The correct prejudice analysis is whether appellate counsel's failures on direct review caused Nilsen to not exhaust his state remedies by filing a petition for review in the California Supreme Court (to exhaust under Rule 8.508 or otherwise), a precursor to Federal habeas review. The answer is yes. Appellate Counsel's own sworn affidavit (Appendix B) states,

> "[W]hen retained to represent Nilsen, I advised him that I would file his appeal and ensure that his state appellate rights were exhausted. I was aware that he might want to later file a writ of habeas corpus in state and federal court. [¶] I intended to cause a

> Petition for Rehearing and a Petition for Review with the California Supreme Court.... [¶] In a letter dated February 5, 2009, I wrote to Nilsen to advise him of the decision of the appellate court and inform him that a petition for Rehearing with the Court of Appeal and a Petition for Review with the California Supreme Court had been filed .... I wrote, I have now exhausted all appellate remedies in your case. [¶] In a February 5 letter, I provided Nilsen the wrong date that the Court of Appeal affirmed his conviction. I wrote the conviction was affirmed on September 22, 2008. The conviction was actually affirmed June 30, 2008."

The State argues that petitioner had an adequate alternative remedy, filing a petition for writ of habeas corpus in the California Supreme Court. (Opp. at 8.) Not so. Petitioner sought to exhaust his claims raised on direct appeal; specifically, sufficiency of evidence, which is a federal constitutional issue in criminal cases. Nilsen is procedurally barred from raising the identical issue on habeas as direct appeal. *In re Waltreus* 62 Cal. 2d 218, 225 (1965)

Nilsen exercised diligence in attempting to file his petition for review. Through habeas counsel petitioner filed a petition for writ of habeas corpus on September 23, 2009[2] to file a belated petition for

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[2] In its statement of the case, the State inaccurately notes that petitioner filed a writ of habeas corpus in the California

review. He also attempted to file a petition for review of his direct appeal and to exhaust his available state remedies. But receipt was denied by the clerk of the California Supreme Court for "lack of jurisdiction."

Here, petitioner did not have knowledge of the decision, transcripts, the Court of Appeal opinion or the accurate date of the court's decision allowing him to seek petition for review. Petitioner's petition for review to the California Supreme Court was due on August 11, 2008. Cal. Rule of Court 8.264(b) & 8.500(e)(1). Petitioner was not advised by appellate counsel of the appellate court decision until February 5, 2009. And even then, counsel provided the wrong date that the court of appeal affirmed the conviction. Counsel also falsely told petitioner he had timely filed a petition for review therefore petitioner had no reason to think that any action was necessary on his part. In May, 2009, Nilsen wrote to attorney William Kopeny seeking legal representation to collaterally attack his conviction. Appendix C, D and E.

Supreme Court on September 29, 2010; in fact he filed it on September 23, 2009.

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be granted. The Court may wish to consider summary reversal of the decision of the California Supreme Court.

Respectfully submitted,

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